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Inactivity of criminal prosecution, control in the procedural phase before and after archiving in the European Prosecutor's Office and problematic issues to be solved in practice

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Abstract: The aim of this paper is to highlight in a comparative and non-comparative way the procedural process that is followed according to the EPPO Regulation for the non-procedure of the exercise of criminal prosecution. With comparative way we mean the national law of each country of the Union that often shows and opens the way to a double screening and control of documents as well as of the procedural process before arriving at the archiving and/or reopening of investigations. A control that is also done by the Court of Justice of the European Union and certainly does not affect the documents relating to the accusation made by the same European prosecutor. A control that shows the work carried out in a precise way by the EPPO and at the same time a second screening by the internal law even after the archiving of a case by the European Prosecutor's Office as well as by a national

judge. In order to do so, we have devoted ourselves to the analysis of the problematic issues that have arisen in practice, through the work of the EPPO, and of what will happen in this regard in the coming years in the field of European integration in European criminal law.

Keywords: EPPO; inaction of criminal prosecution; procedural process before filing a case; procedural process for the review and reopening of investigations; PIF crimes; EDP; European Public Prosecutor's Office; national law; CJEU; filing a case; grounds for filing; principle of legality; mandatory action; European Public Prosecutor's Office; conditions for admissibility.

Towards the decision to dismiss

Art. 35, par. 1 of the EPPO Regulation includes procedural and substantive requirements for dismissal, which are regulated by the same Article and by art. 39, par. 1 (Brodowski, 2021). Par. 3 of art. 39 provides from a procedural point of view a mandatory nature for the EPPO in the case of dismissal of the related cases. In particular, art. 30 deals with and refers to art. 35 since it provides that:

"(…) the exercise of the criminal prosecution has become impossible under the law of the Member State of the European Delegated Prosecutor handling the case, the Permanent Chamber decides, on the basis of a report provided by the European Delegated Prosecutor handling the case in accordance with

Article 35, paragraph 1, to dismiss the case (…)".

The decision procedure is superimposable in relation to the exercise of the action. The two main actors continue to remain inactive and the Permanent Chamber is charged with deciding and having the final decision (Novokmet, 2020).

In cases where the proceedings are directed towards archiving, the EDP requests the relative archiving outside the content of its request and the Permanent Chamber does so towards the path of inactivity. This peculiarity recalls that the EPPO Regulation highlights the case that refers to a single charge against a single subject. The path of inactivity does not concern all the crimes of a single suspect but all the suspects.

The peculiarities recall that the EDP determines and requests that the collegiate body excludes the need for the suspect to notify the conclusion of the preliminary investigations.

The Permanent Chamber decides and orients itself towards the exercise of the action asking the EDP to proceed with the relevant notification according to the reference article. When the EDP proposes to proceed with the archiving, the Permanent Chamber takes the decision, that is applicable through tacit consent, according to art. 36, par. 2.

The Permanent Chamber precludes the archiving of the case and the EDP requests to bring the case to trial. Art. 39, par. 3 affirms that the EPPO has obligations to consult with the national authorities and archives only after it has done it with them.

The European Public Prosecutor is competent for the related crime, according to Art. 33, par. 3 of the EPPO Regulation, that is for a crime in the matter of expenses regarding the Union.

As regards the obligation to consult, the categories of national crimes lead to greater interest and warn at European level to prosecute the related conducts. After the consultation, the national authorities can request the referral, according to Art. 34, par. 6 of the EPPO Regulation and par. 7 and 8 of the related provision.

The obligation to consult is used in cases where the reason for archiving and of the EPPO do not exist for the national authority. The EPPO Regulation does not include and does not specify the decision-making procedure that gives rise to the consultation.

The issues are resolved by Art. 58 of the EPPO Regulation, which establishes that EDP proposes archiving after having informed the national authorities, i.e. after twenty days. Such a choice attributes the competence to the EDP, which is analogous and carried out in an express manner with art. 40, par. 1 of the EPPO Regulation. It also imposes in an analogous manner the obligation to consult with the national authorities in the case of recourse to a simplified procedure.

The national authorities request the archiving of the case and the European Public Prosecutor has the right to do so since it is

considered compatible with the EPPO Regulation. It is stated that the national authority has the power to block the relevant proposal for the archiving of the EDP. The reasons for archiving are stable and the criminal initiative is subject to the principle of legality since there are two alternatives. The EPPO should archive the case or not.

The states have a two-way path ahead of them. On the one hand, to argue and consider that there is no reason for archiving and on the other hand, to ask the European Public Prosecutor to refer the case if the reasons of art. 39, par. 3 exist.

The Permanent Chamber decides for inactivity and carries out the reallocation of the case to a Member State other than the previous one. This power of reallocation finds its source in art. 26, par. 5, which allows the relative reassignment when the criminal action has not been exercised.

The only limitation provided is the decision to exercise the action for cases that the reallocation has been made even in the case of archiving. Art. 36, par. 3 does not include for archiving a similar consideration that requires to conclude and reallocate a necessary case.

The reference to PIF offences includes the right of jurisdiction pre-established by law. The jurisdiction in the case of the European Public Prosecutor decides for archiving and considers that the EPPO Regulation does not exclude the jurisdictional

control relating to the criminal action, as provided for by national law.

The judge thus intervenes and the EPPO orders the relative imposed reallocation with the aim of respecting the relative criteria for the identification and jurisdiction of art. 26. The reallocation considers that the national control of inactivity does not exclude divergences from state to state on consequences relating to archiving.

The preclusive effect for new investigations and criminal actions shows the need and application of rules that achieve the identification of a competent jurisdiction. The reallocation that exploits national legislation and the reasons for archiving facilitate and hinder inactivity at the same time. This is, therefore, a forum shopping and the discipline of the EPPO Regulation is opposed and does not facilitate.

(Follows). Grounds for archiving provided for

Art. 39, par. 1 of the EPPO Regulation provides that the Permanent Chamber decides to archive the case. One of the grounds provided for is that relating to the exercise of criminal prosecution, which is impossible by the law of the Member State of the EDP, which has the case in its hands. In such a case, the national legal system does not allow and requires the inaction of criminal prosecution.

The relevant requirement has to do with art. 39, which requires the verification of one of the grounds provided for by EPPO Regulation. Archiving, in such a case, is necessary according to the EPPO Regulation and national legislation.

For EPPO crimes an area of inactivity is restricted and respects national rights. It is a need for double check that supports the decision of the Permanent Chamber of archiving. In such a case, the judicial review provided for by national legal system remains necessary. Before the judge there is the ground for archiving which is provided for by domestic law and which is not based on art. 39. So there are two ways. The first one considers that the national judge operates under his own control and applies art. 39 without archiving since one of the relevant requirements in this regard is not present. A second way that shows that domestic control is regulated by the national system and the judge does not verify art. 39 but detects the presence of a cause that is oriented towards archiving.

The first path seems to be flawed since the national judge applies the national law and the EPPO Regulation. The related flaw has to do with the scope of application of the double control that is provided for by art. 39. This problem does nothing but strengthen the intervention of the control function that determines the inactivity on the part of the Permanent Chamber that reconciles the setting of the EPPO Regulation.

Art. 39 establishes the reasons for archiving. It notes the provisions offered in favor of the application of the EPPO Regulation including the liability of the entities. In the case of mental infirmity of the accused the dismissal of the case exists during the trial since the hypothesis goes and follows the rules of national law.

The European text interprets in a broad and varied way the infirmity that exists when the non-imputability for the subject does not have the capacity to understand the fact. The hypotheses are included according to cases that are part of national criminal law. As archiving, we also note the case of amnesty that has been granted to the suspect and/or the accused. Also in this case we refer to national law and to the causes of extinction of the crime that enter into the scope of application that considers the cause of extinction of punishability.

Archiving is provided for by the code in a peremptory manner according to the principle of the process even in the case that the punishability of the fact ceases. The same consideration also applies to reference to a new rule of judgment for archiving. This formulates in a reasonable manner the prediction of the sentence in front of an intervening amnesty. It is applied to the judge the res judicata that cannot be a reason for archiving. The EPPO Regulation includes not only provisions of a general nature but also particular ones, as a reason for archiving.

Cases of immunity have to do with archiving according to national law. This is substantial immunity as a cause of justification that arises the argument of archiving if it considers that it proceeds to the hypothesis that the fact does not constitute a crime. This is procedural immunity that is necessary for the authorization to proceed and the condition that the exercise of criminal action may give rise to archiving.

Yet another avenue of archiving has to do with the expiry of the national legal term that concerns the exercise of the action. Here the national reference is sought in the formulation relating to the prescription of the crime. It also constitutes the cause of extinction of the crime and of archiving according to national law.

The limitations for the application of prescription are noted through the CJEU as for example in the Taricco case.[1] The CJEU has seen in the first line the national legislation on the prescription that was capable of undermining the related obligations for the protection of the financial interests of the Union. They are imposed by Art. 325 TFEU as a possible obligation that disapplies its own discipline.

The constitutional legitimacy concerns the rule that makes the preliminary reference by entrusting the CJEU with the related task as a second decision.

1CJEU, 8 September 2015, C-105/14, Taricco and others, ECLI:EU:C.2015:555, published in the eletronic Reports of the cases. 5 December 2017, C-42/17, M.A.S. and M.B., ECLI:EU:C:2017:936, published in the electronic Reports of the cases.

The European judges have affirmed the disapplication that concerns a violation of the principle of legality for crimes and penalties. This is an insufficient cause that determines the applicable law as well as the retroactive application of a regulation that imposes the regime of punishability at the time the crime is committed.

For this purpose, the archiving for prescription remains within the space of breadth, that is provided for by the national legal system. Another reason for archiving concerns the final provision for the suspect and the accused for the same facts.

The archiving for ne bis in idem cases defines the key concepts for the same facts and/or the final provision refers to the national legal system.

The archiving as well as the ne bis in idem applies to national law but also finds its basis in the law of the Union with an extensive way that goes contra legem. It takes into account par. 1 that requires the exercise of the action as well as the rule of the law of the Member State from the EDP that is in charge. It turns out that Union law is not applicable to the rule of national law and from the CFREU.

According to Art. 51 CFREU the CJEU interpreted the expression "implementation" in the Åkerberg Fransson case,[2] i.e. applied Art. 50 CFREU which concerns the prohibition of

2CJEU, 26 February 2013, C-617/10, Åkerberg Fransson, ECLI:EU:C.2013:10, published in the electronic Reports of the cases.

second judgment to a case of connection with Union law which discusses tax fraud. According to the CJEU the Member States have the obligation to ensure and fight against fraud. Art. 325 TFEU imposes and fights offences detrimental to the financial interests of the Union. Furthermore, it constitutes a resource for the Union for criminal proceedings which are applied and opened to the state which makes applicable the CFREU and the EPPO Regulation.

(Follows). The lack of relevant evidence

Art. 39, par. 1 of lett. f) has highlighted the lack of relevant evidence. The absence of evidentiary aid for the accusatory phase takes into account the scenario of an evidentiary void that is unlikely a restrictive, reasonable solution that requires archiving. Even a total void that is evident seems rigid and consistent with the principle of the favore actionis, which characterizes the discipline of the EPPO.

This solution considers that the action allows the evidence that is missing and that is insufficient in favor of the decisive solution of archiving that occurs after the conclusion of the investigations, according to art. 35, par. 1.

This is a circumstance that considers that the European legislator wants the Permanent Chamber not to decide on the basis of a superficial control since the provision requires the knowledge of

causes. Thus, the EDP has the obligation to address that the Permanent Chamber has carried out investigations of an exhaustive nature.

Insufficient evidence is part of letter f). It is connected with insufficient content derived from national law and not only. The problem thus presents a case of archiving under examination which in reality is the general result. Thus, the reasons for archiving indicate that art. 39 follows national law.

The standards for archiving are different for PIF crimes. This creates a disparity between subjects who are accused of crimes different from the countries of the Union. A person can be found in a state that establishes a rule favorable to the person who is accused.

The European standard prevents archiving rules that are generous and provided for by national law. It also prevents the repression of criminal phenomena in question. The possibility of a reference to national rules takes into account the process that applies such specific rules.

A double check between the regulation and national law leads to the exercise of the action ending inevitably in a sentence. The place of proceeding respects the rule of judgment that adopts the provision that concludes to archiving the case in a similar and reasonable manner.

A problem of unequal treatment is created between people who are accused and people accused of another crime. The European judgment rule overlaps and raises the problem of unequal treatment between various jurisdictions. The application of a standard between subjects, subjected to different systems, is sufficient to be verified by the individual system.

The unequal treatment between subjects who are subjected to different national systems are part of the rule. A trial is not held when the evidentiary profile allows a reasonable prediction for the conviction. The new judgment rule is aimed at the debate that applies in a reasonable manner and provides the elements that are collected for the judgment that ends with a conviction of the accused beyond any reasonable doubt.

The evaluation takes into consideration the conviction of the accused. From the debate new evidentiary elements arise in an unfavorable manner for the accused. The decision to dismiss and the rules for the evidentiary assessment including the evidentiary exclusion applicable for the process that does not depend on investigative acts that are not used and due to the principle of separation of phases are taken into account.

The need to take into account the exclusion rules provides for the conviction of a main element against the accused that consists of an interception for cases that are regulated by law. The application of the trial standards and the elements of the

accused that are collected during the investigation are insufficient and contradictory after the pronouncement of the judgment of the place to proceed and of the release order. According to art. 39, letter g) the judgment of the release order is pronounced. Art. 39, letter g) concludes and applies the decision to dismiss for EPPO proceedings and it is not possible to dismiss an insufficiency of an evidentiary nature.

The evidence is absent and insufficient also adding and obtaining absurd and opposite results. The issue regarding the possibility of archiving, according to letter g), is relevant and respects the crime that is outside the archiving of the European Public Prosecutor, which puts the crime in a missing condition.

The conditions for referral in the cases of national authorities, according to Artt. 25 and 34 of the EPPO Regulation, must be done when the crime is not archived. National authorities do not accept, according to art. 34, par. 5, sufficient and relevant evidence for the crime and the Permanent Chambers thus determine inactivity.

For some reasons the provision affirms that the European Public Prosecutor is competent to exercise the archiving action and the case that is in accordance with the rules established in this regulation as a provision that allows archiving for lack of attribution with implicit way.

Another reason is the violation of the principle of legality of the exercise of the action that prohibits the legislator from providing reasons for archiving that do not find a justification and uselessly expand the spaces of inactivity. It is considered that the relative justification is missing in a specific case and concerns a crime that respects the collection of sufficient evidence that substantially presenting the impediment to the conduct of the trial and the imposition of the sentence.

Archive the crime EPPO that does not proceed the action is interpreted according to letter g), as a reasonable prediction of conviction that extends the lack of relevant evidence outside of insufficient probative evidence including the conviction that is not foreseeable. The provision is thus interpreted by art. 39. The reasons for archiving are expressed and are distinguished from the reasons of law that are apparent at first sight.

Atypical reasons for dismissal

Recital 82 of the EPPO Regulation refers to the reasons for dismissal that are established in an exhaustive manner. A provision that leaves no room for the reasons for dismissal that are expressed and provided for as a European source. The relevant list provided for by art. 39, par. 1 did not exhaust the hypotheses that the proceedings should not continue. The hypotheses of a dismissal for the exercise of criminal

prosecution according to national law are also not considered. The regulation allowed that the dismissal and the text did not report anything but the possibility of a real obligation to dismiss was the basis for the process.

The situation was different for the national law that gave the public prosecutor the power to obtain the relative closure for the case. This is the case where the national system allowed the waiver of the action by a person who agreed to become the witness for the prosecution. In this case the principle of peremptoriness prevailed for the hypotheses of archiving.

The difference for the two scenarios was based on the closure of the case that depended on a choice of the public prosecutor. The reason for archiving was provided by Art. 39 of the EPPO Regulation that verified the list of the principle of peremptoriness. Recital no. 81 was explicit on the point and asserted that the principle of legality of the action formulated the provision of Art. 39 of the EPPO Regulation that considered the level and the hypotheses of the expressions used.

The reason for archiving did not foresee and constituted an obstacle to the exercise of the action at national level. The European Public Prosecutor brought the case to trial and the national judge was required to declare the obstacle to the performance of his duties regarding the control of the action. The European legislator wanted the national reasons for filing to

be relevant to directly predict the reasons for prescribing the action that precluded with a simple way the basis of national law.

The European legislator did not forget the possibility of inserting the domestic reasons for filing with an autonomous way. Reference is made to the case that the exercise violates the rights established under Art. 6 ECHR. The opportunity of insertion as a reason did not also mean the expansion of the catalogue with a necessary way but useful remedies to avoid the injury to the rights of the accused.

The final objective was to provide a comprehensive list to precisely establish the archiving requirements and the price of the risk that left out in an appropriate manner what remained "coverage".

The reasons for archiving achieved the effect that national law provided for archiving spaces that respected the regulation as well as the treatment for the accused subjects, who committed the crime at the EPPO, as subjects of national procedural rules.

The hypotheses of inactivity were not foreseen and that constituted in a forced manner the normative data, as a legal instrument that allowed to fight injustice and to denounce the discrimination of the CJEU through a related preliminary reference.

Archiviation according to Art. 36, par. 7 of the EPPO Regulation

The reference to Art. 36, par. 7 refers to the procedure that adopts the decision on the appeal of a judgment referring to national law, which according to the EDP takes a position that leads to the archiviation of the case. The EDP presents the draft decision and the deliberation of the Permanent Chamber, except that is sufficient to carry out this commitment. The Permanent Chamber instructs the EDP to maintain and/or withdraw the relevant appeal in this regard.

According to par. 7 the referral for the cases of archiving that are foreseen under national law takes into account the inactivity that is possible under art. 39 and art. 36 for reasons that are established by national law. Art. 36 thus represents the term of archiving confirming in a systematic way and providing for the total recall for reasons that are foreseen by national law. It establishes the level of European source in a parallel way with the reasons for archiving that are applicable and are based on national law.

Art. 39 does not follow the scenario of an oriented and expanding function for an archived proceeding that is totally useless. The provision and the decision relating to the appeal fuels its own perplexities.

Art. 36 has dedicated itself to the exercise of criminal action. The insertion of a provision relating to archiving is central and presupposes the discipline of the article relating to the criminal action that is exercised. The archiving provision contains the referral of causes of inactivity that are foreseen by national law. This provision is regulated in a procedural and autonomous manner through the relative referral.

The legislator has regulated the course of the process. The archiving is incorrect and takes into account the action exercised. The public prosecutor does not have the power to request the archiving and, therefore, waives the action.

The rule also refers to the exercise of criminal action based on art. 36, par. 7. The scenario that national law allows the judge after the agreement of the public prosecutor to continue the initiated process remains extraneous to the archiving argument. A complicated path that makes one think of the proceedings that are initiated at national level and that allow the implementation of the European provision.

The investigations of the European Public Prosecutor. Completeness and inactivity

The exercise of the action and/or archiving comes at the moment that the EDP considers that the investigation is concluded, according to art. 35, par. 1 of the EPPO Regulation. An

expression that shows that the European Public Prosecutor relies on the principle of completeness of investigations at a secondary level. Completing the investigations for the Public Prosecutor means to complete the investigations and collects elements relevant to the evident principle. The decision of the EPPO is relevant for elements that evaluate its own disposition.

The body that continues the exercise of the action formulates the accusation and adequately controls its own validity of the case to an abbreviated procedure that is useless for the resources. Concluding the investigations plays a fundamental role in the hypothesis that the Permanent Chamber is oriented towards archiving.

Exhausting the investigative framework has as its objective the risk for inactivity when the evidence of the investigative gaps is insufficient. The same holds for the principle of legality and the obligation of criminal prosecution. Such a principle of the system as it is outlined by EPPO Regulation and in particular by art. 35, par. 1 does not affirm the complete investigations.

The EDP is left free to archive when the investigations are considered concluded. The EDP acts in good faith and the request to the Permanent Chambers are effective and convincing for the conclusion of the investigations. The position of the EDP does not think about the evaluation of the arbitrariness for a single investigator. It is considered that things are not different if

the Permanent Chambers request an investigative suplus, according to art. 35, par. 2. From an investigative point of view, the control that is completed, through the collegiate body, is added.

The investigations are concluded and consider that the decision of the EDPO proposes that the request for access to a simplified procedure, according to Art. 40 of the regulation, is sufficient to conduct the investigations and proceed by implying the judgment of less completeness that respects the decision for the exercise of the action in ordinary form towards the inactivity of the exercise of the criminal action.

An excessive interpretation has a multifaceted nature for the completeness that clarifies the plea of bargaining during the course of preliminary investigations that are complete and avoid the charge to the case.

The public prosecutor is called for the quantification of the penalty and the need, completeness to carry out the assessment relating to the quantification of the penalty that is outside the rites and carries out the debate based on forms of judgment. It is excluded that the use of a simple procedure leads to a devaluation of the principle of completeness for the investigations.

A fundamental doubt persists on the European provision that respects the conclusion that is used according to art. 35 for

completeness. It thus refers to the temporal conclusion for the investigations and its own deadline.

The provision is consistent with the European discipline and the terms for the duration of the investigations, that according to par. 1, establishes for the EDO and formulate the request for the investigations to an excessive and long period of time.

The provision is consistent with Art. 5, par. 5 of the EPPO Regulation. It prescribes that EPPO conducts investigations without delay thus leaving room for the maximum duration for a specific case. The time in the evidentiary stage is forced.

The lack of provision for the maximum terms of investigation is explained according to the will to postpone the national disciplines. It is correct to say that the principle of completeness, according to art. 35, does not include some control by the Permanent Chamber for the duration of the investigations and the control of completeness. The investigations are necessary and exhaustive. They are based on considerations that show the relationship between completeness and obligatoryness, rectius legality of the action that avoids the exercise of the criminal action.

The principle of completeness, according to art. 35, par. 1, includes the list of requests. It allows the Permanent Chamber to exercise the action in ordinary and/or simplified form, to archive or refer the case to the relevant national authorities, according to

art. 34. It is not necessary to follow the error in the case that refers to complete investigations.

The application of such a principle is limited to cases that want to exercise the action and/or archive. The rule includes the request for the EDP that precedes the conclusion of investigations.

The Permanent Chamber orders the referral during the investigations that are contrary to the assumption for the determination of the criminal action. The referral in the case does not mean that the investigations cannot be carried out. The decision is up to national authorities. Exhaustive investigations avoid useless processes for archiving that are justified.

The instrument of the EPPO Regulation provides that it is competent for the cases that allow to waive the relative attribution. This decision is not evident and necessary for a complete evidentiary framework relating to the defendant's liability which is sufficient for the elements that allow one to decide on one's own competence.

Art. 34 allows the relative referral to the national authorities that during the investigations establishes and proceeds without an obvious delay. Thus, the relative presuppositions emerge. Par. 2 refers to the referral that is relative for cases that the exercise of the competence justifies art. 25, parr. 2 and 3 before the initiation of the criminal action. It is specified that the only

moment for the decision is followed according to the final proposal of the EDP. The same conclusion expresses that Art. 57, par. 1 and Art. 35 of the EPPO Regulation propose that EDP after the conclusion of the investigations completes in its own place and proposes the referral that does not prohibit that arranged by the Permanent Chamber for the referral.

Permanent Chambers and CJEU. The control related to archiving

Normally the control for an act of archiving is done through the judicial control that is carried out, as well as by the victim who makes his request. The judicial controls that concern the EPPO are distinguished between those that are carried out at European level and those at domestic level.

The first control related to inactivity is specified in an individual way and with reference to the activity of the European Prosecutor. We can speak for a control that the Permanent Chambers carry out the request for archiving. According to Artt. 35 and 36 of the EPPO Regulation the main role is carried out through the collegiate body after the proposal of the EDP that avoids the cause at the moment that the relative requirements are arranged.

The Permanent Chamber accepts the request of the EDP, according to art. 35, par. 1. The collegiate body can decide to

archive and to ensure that the investigation has been concluded. The final conclusion has to do with the order to exercise the action regarding the control that comes on the reverse of the request for inactivity of the EDP.

Another control of a jurisdictional nature concerns Art. 42, par. 3 of the EPPO Regulation in relation to the action for annulment. It is reported that:

"(…) paragraph 1 of this Article, decisions of the EPPO to close a case, in so far as they are directly challenged on the basis of Union law, are subject to judicial review by the Court of Justice in accordance with Article 263, fourth paragraph, TFEU (…)".

The derogation of par. 1 has to do with compliance with archiving. The CJEU checks and decides to close the case. There is no doubt that the rule refers to situations in which the procedure is closed according to art. 39, par. 1. It is also immediately recalled art. 36, par. 7 which refers to the archiving of the case when further doubts arise on the decision that is contested before the European judge.

Art. 46 does not regulate the hypothesis of archiving. As grounds for closure, according to art. 36, are identified the reference to national law which indicates that a direct decision on the basis of Union law is difficult unless the disputes concern the rule which permits procedural defects.

Art. 42, par. 3 is not applied in the case where the Permanent Chamber decides to exercise the criminal action with a simplified form, according to art. 40, without thus arriving at the

archiving of the case. It should be noted that the provisions are controllable and the decision of the EPPO to archive is taken by the Permanent Chamber. It does not seem that in this way the draft decision is challenged, assuming thus the internal value of its own organ.

Of course, doubts exist regarding the decision of the Permanent Chamber which considers, what is provided for by national law and the EDP. In this way the decision of the collegiate body is specified with a provision that allocates the external effects. It is considered in this way what is required by the EPPO Regulation. It asks whether the provision subjects the control from the CJEU of the decision of the prosecutor as well as of the decision of the Permanent Chamber. It is taken into consideration that the decision of the collegiate body leads to the decisive scrutiny of the CJEU.

The provision of the chamber is European and the form of the content is regulated by domestic law, contrary to what is happened in the case of the provision of EDP. It is also possible that the national law of reference does not provide for the judicial control on the inactivity, as an object of appeal of the CJEU. It is not the decision of the Permanent Chamber but the need for the EDP to formulate a request that is addressed to a judge or others.

According to art. 39, a double control is not foreseen. The coexistence due to the impossibility of following the exercise of the action is foreseen by national law and by art. 39 which refers explicitly to national law to evaluate the consent to archive a specific case.

The relative challenge before the CJEU for archiving is not considered legitimate. The CJEU, based on art. 39, becomes a direct interpreter of the archiving disciplines that are foreseen by national law and that is compatible with the function of the CJEU, understood and considered in a way precluded to the interpretation of state legislation.[3]

The CJEU is now competent when the appellant complains in a specific case that there are no reasons for archiving. In this case the challenge is made by art. 39 of the European regulation.

The grounds for the annulment of the relevant archiving decision of the Permanent Chamber also include procedural defects that are part of the work of the EPPO. They are precise according to the letter of the law and fall within the scope of disputes that are based on the law of the Union. This is the only limit provided by the provision that respects the possible complaints.

The procedural defect is assessed according to art. 35, par. 1. The regulation does not indicate the procedural requirements

3CJEU, 19 February 2009, C-321/07, Schwarz, ECLI:EU:C:2009:104, I-01113, par. 48. 6 March 2007, C-338/04, C-359/04, C-360/04, Placanica and others, ECLI:EU:C:2007:324, I-01891, par. 36.

that are respected except for the annulment of the decision which in practice appears to be different. The completed acts and the abstract facts thus entail their own lapse.

The outcome of the proceedings and the decision of inactivity are the result of an internal deliberation of the body. As a consequence, the modus that arrives at the deliberation has no external impact. This solution is preferable and the participatory rights in favor of the accused and/or the victim of the crime are difficult to identify.

The only exception is that the procedural defects are of external irrelevance and identify the rule that prohibits the Permanent Chamber from archiving the case that EDP requests the exercise of the action in ordinary form, according to art. 36, par. 1. It is therefore a prohibition that exists and makes the verification control of the occurrence of a specific case as an irrelevant reason for archiving provided for by art. 39.

Art. 42, par. 3 thus identifies the action that exercises the decision against the archiving of the European Public Prosecutor's Office which refers to Art. 263 TFEU. This is how the action for annulment is regulated.

The non-privileged applicants, that is, any natural or legal person, can demonstrate that the act to be annulled is adopted for their own sake and directly and individually concerns the act which has a regulatory nature as well as the implementing

measures.

There is no doubt about the fact that it includes the legitimated and the injured party of the crime. This also includes legal persons as well as the bodies, the agencies of the Union which are harmed by the related criminal conduct. The legitimacy of the institutions do not refer to the paragraphs of Art. 263 TFEU.

Recital n. 89 opens the doors to appeal but only when the archiving is contested on the basis of primary law of the Union and on the basis of the EPPO Regulation.

The wording of Art. 263 TFEU does not exclude the possibility that the legitimate suspect challenges regarding the annulment of his decision. The effects of an annulment decision from the CJEU leads to effects of a definitive nature that are considered not existed.

The EPPO procedure is easy to imagine because it is provided for by national law and is considered incompatible with the regulation and not with the control of the national judge, who confirmed the archiving. As a last measure is that of the Permanent Chamber that is likely to reactivate the procedure provided for by Art. 35 of the EPPO Regulation.

The intervention of the national judge, who assessed the archiving, is justified and the issue becomes complicated. The decision of the Permanent Chamber to archive has national effects formulated by EDP. It does not seem possible that the

annulment affects the relative provision of the judge.

The jurisdictional act does not seem to have a logical legal precedent. It seems that this is regulated by national law. The Permanent Chamber has the task of carrying out the screening on the reasons for archiving which are provided by Art. 39 of the EPPO Regulation. Any act of EDP that is not regulated by a European source finds its source in the national discipline as well as in the control of the CJEU.

Among the consequences that we have is the request from the EDP as a solution that excludes that the CJEU has direct effects on the archiving (Turmo, 2021). It is unreasonable the conclusion of a judicial review that cannot be effectively translated against a flawed act that constitutes the testimony and the difficulty of considering admissible the control of the national judge on the archiving. The control of the CJEU leads to a weakness that is activatable distinct from the related controls of a domestic nature.

National control

When we talk about national control, we are referring to the decision of the Permanent Chamber that is based on Art. 35 of the EPPO Regulation and to the proceedings that are archived. The provision of the Permanent Chamber thus has the direct effect of producing the archiving and national law refers to and

activates the national controls that are foreseen. The choice that inherently determines the criminal action is regulated by Artt. 35 and 39 of the EPPO Regulation and has no express space in the intervention of national bodies.

The only body attributed the power of decision is the Permanent Chamber according to its pre-established provisions, i.e. artt. 35, parr. 1 and 2 and art. 39, par. 1, as a request in progress. The instance of the EDP also addresses the request for archiving in a direct way and the system of the regulation aims to be self-sufficient.

The control concerns the procedural consequences of archiving provided by EPPO Regulation. It continues according to national law and is limited to administrative obligations based on art. 39, par. 4. The Permanent Chamber after an official communication from the national authorities attributes to the collegiate body the archiving of the case.

The national control on inactivity admits the decision of the Permanent Chamber that follows the request for archiving that is formulated by EDP. The collegiate body is suitable for drafting a document and the request for archiving asks and finds its knowledge in national law.

The European Public Prosecutor before the judge and the EDP directly confronts the case with office bodies of the same level.

The formulation on the part of the EDP does not provide for the relative provision. Art. 13 outlines that the function of the EDP and the legislator expressly provides for the exercise of the action that has not provided for inactivity. Thus, the archiving provision of the Permanent Chamber is attributed.

The national judge assesses the archiving by applying Art. 39 of the EPPO Regulation. The provision considers and is limited to the decision of the Permanent Chamber. The judge limits himself to applying, therefore, the national rules. The solutions seem satisfactory and the affirmation of the national law that finds the basis for the archiving reasons provided by the regulation are not applicable and are useless data.

The national control of the inactivity and the judicial control of the CJEU regarding the decision of EPPO loses its meaning taking into consideration the fact relating to the annulment as well as the decision of the national judge.

The admissibility of national control provides according to art. 42, par. 1 and prescribes the activity of national controls for all the EPPO that produce legal effects towards third parties. The ratio of the provision offers protection for the subjects who are interested in the acts.

The wording of the provision asks in an express manner and produces effects towards third parties, as a precise ratio that protects and explains the protection of recital no. 87, implying

the existence of a connection of the jurisdictional control and the prejudice to the rights concerned according to recital no. 88 with reference to national remedies, that are due to acts of EPPO towards third parties. Art. 42, par. 1 protects the positions of third parties.

The referral of domestic controls, that carry out in an intended manner the opposition of the archiving of the injured party and subjected to investigations, are the only subjects who complain of violations of rights at the time of archiving. This is a consideration that allows us to reflect that first of all, national jurisdictional control is not prescribed on decisions to archive outside the request of the injured interested party and the deliberation in the sense of inactivity.

Another path is that of the protection of the victim and of the accused which is based on art. 42, par. 3 at the time of archiving. An exception of this rule is provided for by par. 1. A control is thus founded for the decision not to exercise the action. The regulation does not exclude domestic control considering art. 51 which refers to national law.

The case does not constitute a hypothesis that shows a gap in the European text since the situation resorts to national law in an integrative manner. The regulation leaves no shadows to domestic control because the discipline is self-sufficient. Already art. 42, par. 3 states that a control of inactivity and not

only that of the Permanent Chamber is oriented to the applicability of art. 5.

The decisions of the Permanent Chamber seem to have internal effectiveness. The determination of the collegiate body is based on the act of the EDP regarding the archiving and the request for archiving that is addressed by the national judge. The determinations of the Permanent Chamber have national effects.

The Permanent Chamber considers the indications of the regulation as well as the determination of inactivity that constitutes an exception and produces inactivity in a decisive way.

The decision of the Permanent Chamber regarding the archiving and the related provision is reasoned, constituting a “burden” to the procedural system. The reasoning considers the decision that challenges the action for annulment before the CJEU, according to art. 42, par. 3. The judges of Kirchenberg do not exercise control on the provision of the public prosecutor since it is not adequate on the reasoning.

The admissibility of the judicial review on the decision of the EPPO considers that the decision of the Chamber is sufficient to ask the European procedure to become national. Thus, the archiving is valid only for the archiving of EPPO.

In a negative way the regulation provides for the cases of the European Public Prosecutor's Office, those of national authority

according to art. 34 and 39, par. 3 as well as the reasons for inactivity of art. 39, par. 1. This hypothesis is valid for the fact that the European legislator does not envisage criminal proceedings for the Member States after the decision to proceed with the archiving.

Art. 59, par. 5 of the EPPO Regulation represents the possibility that a national body of a jurisdictional nature re-examines the archiving decision. The regulation does not offer a solid solution to the problem in question. The regulation highlights the position of the college on the matter.

The text of the provision does not include the supported solution and the re-examination refers to the investigations that take place after the archiving. The regulation refers to the archiving time and resumes the investigations. It does not refer to a correct solution that considers the decision of the Permanent Chamber that determines the archiving at all levels.

The solution envisaged adopts the principle of mandatory criminal action in every national legal system. It sets out the reasons for an interpretative methodology. The regulation with antecedent mode is relative to the compatibility of a constitutional nature. It is a mistake to operate a constitutional interpretation that orients towards the European source of the countries adhering to the EPPO.

What happens after the case is closed?

Art. 39, par. 4 highlights what happens after the case is closed. In this regard:

"(…) the case is closed, the EPPO shall formally communicate this closure to the competent national authorities (…) inform the Union institutions, bodies, offices and agencies concerned, as well as, where appropriate under national law, the suspects or accused persons and victims of crime (…) referred to OLAF or to the competent national administrative or judicial authorities for recovery or other administrative follow-up (…)".

The communication to the national authorities refers to those that are competent for the closed case. The national public prosecutor's office reports to the EPPO the news of the crime. Outside of these hypotheses it is difficult to argue that the European Public Prosecutor's Office has the burden of identifying the single competent office.

In practice, it is based on Art. 25 and 34 of the EPPO Regulation. The provision refers to the public prosecutor's office with headquarters in the same city as the EDP that is in charge of the case.

The solution seems to be adequate and invests the Attorney General with the relevant task for the archiving communications. It addresses directly the office due to proximity to the EDP, that has the actual probability and competence. The EPPO should carry out the communication based on art. 56, par. 7 of the EPPO Regulation.

When EDP has been informed of the decision of the Permanent Chamber to continue with the archiving of the case, it should

then communicate this to the offices of the public prosecutor at the headquarters located there. This communication is useful to put the national authority in a position to follow the archiving and recording of this information.

The crime report signals the national authorities to the EPPO and then the register, the ordinary registration that the public prosecutor carries out and highlights with appropriate forms the archiving by the relevant Permanent Chamber. The communication in other bodies of the Union is connected to the control over the archiving decision. The bodies that have the legitimacy to act, according to art. 42, par. 3 of the EPPO Regulation, are interested.

Another communication is made only when it is appropriate according to national law. The opportunity inserted guarantees that the communication does what is not provided for by national law but is necessary to identify what happens. The defendant is notified after the judge's order. This information is made after the function of the notice that puts the subject in the condition to request the relative compensation for unjust detention.

The referral to OLAF and to national authorities of an administrative nature is linked to the admissibility for a national jurisdictional review of the decision. This solution highlights the nature of the administrative and criminal archiving provision. It

is the same provision for national authorities to OLAF that suggests the possibility of following the administrative procedure. According to the regulation, the issue of precautionary measures is not regulated but is limited to a statement that the EDP requests, according to art. 33, par. 1:

"(...) arrest or preventive detention [&] in accordance with national law applicable in similar national cases (...)".

According to art. 5 of the EPPO Regulation, national law applies to the events following its request. In EPPO proceedings, the interpretation determines that the provision of the Permanent Chamber closes the proceedings without the jurisdictional body intervening by investing the suspect with the relative question for the application of the precautionary measure.

Preclusion of archiving and reopening of investigations

According to Art. 39, par. 2 of the EPPO Regulation the archiving decision:

"(…) does not preclude further investigations on the basis of new facts that were not known to the EPPO at the time of the decision and that become known subsequently to the same (…)".

The new facts are the index of a will for the legislator that makes the reopening to be applicable in the archiving cases that are provided for in Art. 39.

The new facts continue the investigations closed according to letter a), collect evidence that leaves in a fair and perplexed way facts different from previous ones for the purpose of establishing a separate proceeding that affirms the discipline of the

regulation for the reopening of investigations.

The new fact thus opens a proceeding of an autonomous nature for a historical event that is different from the previous one and it makes no sense to reopen a closed investigation. The fact is understood in a similar way and covers the notion of facts that concern the indictment.

The punishability is defined and correspond to the essential elements of the crime and to the secondary ones that come to the knowledge of main facts. The facts and their definition are directed by the EPPO. They are also known by the body responsible for deciding for inactivity.

Evidence of new facts is not sufficient. Often the indications, that arise with sufficient force for the validity of the decision to archive, are weak. The provision infers that if there are new facts the EPPO precludes new investigations. It prevents, however, the subject from being subjected in an arbitrary manner to new investigations.

The problems have to do with the verification of the acts and the prohibition of investigations of a preclusive effect. The non-reopening of investigations prevents the exercise of the criminal action that concludes in the opposite way. The legislative choice is influential on the problem of exercising the criminal action. The exercise of the criminal action therefore grants the reopening of the investigations.

EPPO investigations can be considered reopened or not. The positive answer is considered by Art. 5, par. 3 of the EPPO Regulation. The regulation explicitly refers to the duty to reopen investigations but does not specify the consequences of respecting this prohibition.

The referral to national disciplines and to evidence collected that is unusable means that the criminal action is exercised in an unproceeding manner. Procedural aspects that refer to investigations are compatible with the regulation applied.

The control of the judge is provided for by national law. It is considered that the decision to reopen the case produces effects that are linked to third parties subject to investigations based on the control of the national judge, according to art. 42, par. 1.

The decision to reopen a case is different from that of archiving. Art. 42, par. 3 excludes that the applicability of par. 1 opens the doors for the assessment of legitimacy as well as the relative decision to restart the investigations. Such difference through internal control on archiving that is not allowed, as well as an internal control relating to the request for reopening for investigations of an admitted nature shows perplexity under the profile of the principle of legality for criminal prosecution.

In fact, it strengthens the verification tools for the legitimacy of the inactivity of the exercise of criminal prosecution, as well as the legitimacy to act as a choice consistent with the ratio of the

protection of the suspect, who respects and prefers the control as well as the opening of the investigation.

The rule provided for by Art. 39, par. 2 of the EPPO Regulation requires the existence of new facts that apply each judge to reopen the investigations. Art. 59 of the EPPO Regulation raises new facts for the European Prosecutor who draws up the report and also offers other observations.

The Permanent Chamber is competent and decides on the reopening of investigations that it has ordered after the archiving.

Failure to register news about crimes that are not true

The proceedings before the European Public Prosecutor's Office take and highlight the existence of false news about punishable crimes. This has the analogous consequence of not having to resort to a judicial review for inactivity. This limits the application that depends on the position that respects the applicability of a national judicial review, according to the EPPO proceedings.

The orientation towards the non-registration of news is a current phenomenon that avoids the control of the archiving judge, thus losing all meaning. From this perspective, the news is self-archived for the European Public Prosecutor's Office, without passing through the relevant scrutiny of the judge.

Trashing news does not take on a different meaning, within the scope of PIF crimes, that involves the failure to activate a formal procedure, according to Art. 39 of the EPPO Regulation. The rationale is based on the power that trashes and prevents the EDP from formulating a request, the European Prosecutor from carrying out the related check and formulating observations and the Permanent Chamber from studying the request and deliberating.

A series of exceptions of a procedural and economic nature are found in front of the news that appears to refer to a specific criminal fact. This option allows European sources as well as the EPPO to report the crime and its competence for the bodies of the Union. It is related also to the information for registration and verification. Thus, according to art. 24, par. 6, the verification is oriented towards registration and screening as well as to the reasoning to open an investigation.

EPPO decides to start the investigation noting a further step. The rule has a general scope that takes into its scope the application and the investigation, according to art. 27. Art. 26 does not clarify but proceeds in the case that the information of a possible conduct has criminal competence, according to EPPO, and is addressed to subjects other than those indicated by Art. 24. art. 38, par. 1 of the EPPO Regulation.

In this case, the European Public Prosecutor evaluates the investigation and the source of the news in question. The path for the registration for the European Public Prosecutor is based on Art. 39 of the EPPO Regulation having the risk of duplication of investigations.

Art. 24, par. 1 of the EPPO Regulation refers to the obligation to report criminal conduct. Art. 38, par. 1 of the EPPO Regulation states that the information received from the EPPO:

"(…) concerns criminal conduct in relation to which the EPPO may exercise its competence (…)".

The possibility of binning the news refers to the existence of criminal conduct as well as to conduct that lapses the obligation. Registration precedes verification and the legislator assigns the function of filtering news that do not have a truthful basis. This does not bypass the screening phase.

The lack of screening answer the question and the nature of this control showing that the information received is not a notitia criminis. In this way, it is deformed the verification which is different and opens the doors for binning at this stage.

A useful indication comes from the EPPO Regulation which according to art. 30 provides for the verification and evaluation of other elements related to the applicable national law and the crime that has been committed.

A broad evaluation, relating to the communication that contains the news of crime, refers to the judgment that has to do with the

evidentiary compendium in disposition. The evaluation precedes the opening of investigations and the evidentiary elements that are sought, preferable to adopt a broad interpretation without excessively removing its own disposition.

The control concerns the nature of a false news of a crime, the real notitia criminis as well as the exposition of the facts that the European Public Prosecutor can anticipate at the time of its registration. At this stage, the bin is not admissible.

The European Public Prosecutor is responsible to provide for a specific verification procedure. Failure to proceed with the trashing, through a lack of registration, does not conclude the relative analysis of the subject.

Adversely, it moves on to the start of the investigations. The verification of information received and/or acquired ex officio for EPPO allows one to decide and open the investigations towards a case management system or not. The verification of registration is the prelude to the nature of false news. Faced with this false news of crime, the European Public Prosecutor decides to assume an annotation.

The binning cannot be of a hasty nature. The EDP decides not to initiate the investigation according to art. 26, par. 3. The EPPO Regulation and the procedural scans arrive at an indication that saves the procedures, through guidelines of the college. Thus, the decision of the EDP should be communicated to the

European Parliament and the Permanent Chamber.

Of course, the Permanent Chamber can follow an attitude of silence showing acquiescence for the decision without giving further instructions, indicating that the EDP can initiate and/or take over its own investigation.

The registration of the news is mandatory and carried out when faced with false news of a crime. The Permanent Chamber has a power of control that glimpses in regulatory spaces the power of the action of binning.

The EPPO is subject to a jurisdictional control for archiving at the time that is provided for by national law and which is insufficient when it operates as a collegiate body affirming its power to bin the related evidence. When the Permanent Chamber orders and/or maintains a silent behavior regarding the decision not to start the investigation, a filing procedure is not initiated. Thus, the possibility of throwing away the national system is admitted.

The legitimacy in practice with reference to the crimes of PIF is not concluded in a different way. It is established that the Permanent Chamber and its control leads to the bin, consisting in practice in the lack of involvement of the national judge.

The possibility for the intervention of the national judge in the case of filing is excluded, which is sufficient for the Permanent Chamber. It is difficult to speak of binning due to the failure to

start the investigation in the case of filing the control by the Permanent Chamber.

The compatibility check with this system and the principle of mandatory nature for criminal action highlights the internal control of the body as sufficient.

What are the related problems created by the EPPO?

One of the first problems that we have seen in practice after the first years of work of the EPPO concerns the principle of legality. We immediately notice the connection between the principle of mandatory prosecution and external independence of the public prosecutor, that influences the directives not to exercise criminal prosecution.

The European regulation is in conflict with the principle of legality and the rule that requires the European prosecutor to transmit, to the institutions of the Union and to national parliaments, an annual report.

The related duties are referred to general activities and to specific cases, according to Art. 7 of the EPPO Regulation. Art. 6 of the regulation also states for EPPO "interest of the Union as a whole" without taking into account the interests of other subjects (Martìnez Santtos, 2018).

Therefore, we speak of a positive external independence which refers to the prohibition of the European Prosecutor to accept

instructions from outside as well as from other subjects that influence its activity, i.e. negative external independence. The provisions and the balance between guarantee and independence of the body makes its activities accountable.

The EPPO Regulation leaves no room for interference from political bodies. Its primary concern is the independence of the body that affect issues that are sensitive and concern the appointment of the chief prosecutor and his/her deputies from the European Parliament.

Doubts arise from the institutions, namely the European Parliament and the Council that play a fundamental role in the appointment and to the disciplinary procedure for the removal of the office, according to Articles 14, 15 and 16 of the EPPO Regulation. The appointment that is attributed to the European institutions as well as rules that determine the duration of the office are sufficient.

The body also applies the decision that is taken by a jurisdictional body through its own control, namely the CJEU. The regulation gives the EPPO the relative autonomy for the management of resources and the financing of the body. It is based on requests of the bodies that approve the budget of the Union such as the Council and the European Parliament.

(Follows). The conditions of admissibility

It seems very abstract, generic and sometimes lacking the fact that concerns the state of facts. Especially if it is for a current issue such as the attribution of EPPO to relative extensions, according to Art. 86, par. 4 TFEU.

The main difficulties respect the principle of legality and the conditions that depend on decisions relating to public authorities. It is difficult to believe that EPPO attributes to political crimes and leaves to its member states the European regulation, that is, the possibility of maintaining a margin of decision at the procedural level for sensitive issues.

The conditions of admissibility are defined and consist of manifestations, that concern the will of private and public subjects in objective events, that are subordinated for the establishment of the process.

The compatibility problems and the principle of obligatory nature for the conditions depend on manifestations of will of a private individual, such as for example the complaint linked to objective events. The judicial circle of criminal process justifies the public authority as the bearer of an analogous interest for the injured party, that is based on provisions of constitutional rank. A different nature lends the conditions of admissibility in contrast with the regulation, as well as the conditions that hide

evaluations of a political nature.

EPPO chooses the jurisdiction and exercises the action, according to art. 26, par. 4. All the other countries identify the provision and consider the power of ius dicere devoid. EPPO crimes in the matter of inadmissibility due to the will of public entities means take the opportunity and the power/duty to prevent the proceedings from all states that adhere to the relevant enhanced cooperation on which the European Public Prosecutor's Office depends.

Each state can do what it wants according to the conditions of admissibility for the exercise of the action that affects the criminal power of the systems. The European Union body and the conditions of admissibility protect national interests.

The condition depends on a public body that entails the responsibility for the state in terms of compliance and the obligation that prepares repressive measures against fraud that damage the financial interests of the Union when the crime falls within the category of Art. 325 TFEU.

The incompatibility with the principle of legality and the conditions of admissibility in the case of EPPO finds jurisdiction in the investigation for the condition that is missing and that cannot disapply the national rule that also provides for the need to proceed with the relevant proceedings.

Fighting PIF crimes as the main objective of the EPPO

The aim for the EPPO is to fight PIF crimes since they are connected with the principle of legality of criminal prosecution. The instruments subjected to this situation constitute the criteria and the priorities related to the treatment of crime reports.

Speaking of priority criteria means to define the deviations, that is, the chronological criteria for carrying out investigations according to the time of registration and register of crime news. The problem is based on selection criteria that are opposed to the regulatory ones and called for the intervention of a system that determines the statute of limitations of crimes arriving at its own inaction.

The constitutional compatibility for the priority criteria uses this type of arguments. The principle of legality balances with other values the reaction against facts that damage the fundamental goods for civil coexistence and judicial efficiency. As regards the reality of the facts, the criteria established avoid criminal policy decisions and leave the judiciary to depend on its own case.

The priority criteria derive from the inability of a system that disposes the work of the judicial bodies, according to guidelines that translate into assessments of opportunity and into the single crime news.

The positions that are against the introduction of priority criteria are based on the legitimate function, that establishes the impediment conditions. The priority criteria find a response to the legal system, as a phenomenon of forum shopping by criminals.

The lack of defense and the statute of limitations at the end of the investigations tries to make acquittal impossible in this regard. The factual situation pursues and is adequate for the criminal facts rendering compatible the priority criteria that intervene on causes and situations that financial interventions and decriminalization works lead to various uncertainties.

Do the priority criteria have as their objective to prosecute corruption and money laundering crimes? The answer is negative and the EDPs play a double role, as an excluded option that distinguishes the magistrate who carries out his activities as a member of the EPPO from the national prosecution.

It is doubtful whether Art. 5 of the EPPO Regulation opens to national discipline what is not provided for by European provisions. Art. 9, par. 2 entrusts the college with the protection of coherence, efficiency and uniformity in the field of criminal prosecution of the EPPO for the member states. The topics that are linked with EPPO concern the compatibility with the law of the Union. The priority criteria set the hierarchy of crimes and prosecute the PIF crimes that are not part of the attribution of

the European Prosecutor.

The member states have the obligation, according to Art. 3325 TFEU, to combat fraud that damages the financial interests of the Union. Par. 1 of the provision establishes that the rule of national law adopts measures of an effective and dissuasive nature. Par. 2 establishes the related principle of assimilation for the states that adopt the protection of the financial interests of the Union as well as the measures of seriousness of the facts to combat the illicit activity that damages the financial interests. Distinguishing between regulatory and selective criteria leads to the consequence that the measures adopted are not effective and PIF offences have low priority making the priority criterion selective.

Member States generally comply, according to art. 3, with extra-criminal instruments necessary for administrative appeal[4] when it is indispensable due to the seriousness of the fraud.[5]

The reasons for effective repression are based on the text of the Treaty of Lisbon and in the statute of limitations for PIF crimes, as we have seen in the Taricco case.[6]

The priority criteria respect obligations based on Art. 325 TFEU for national bodies that disapply conflicting national, internal provisions. On the contrary, in the Taricco case it is not a

4CJEU, 26 February 2013, C-617/10, Åkerberg Fransson, op. cit., par. 34.

5CJEU, 8 September 2015, C-105/14, Taricco and others, op. cit., par. 39. 5 December 2017, C-42/17, M.A.S. and M.B., op. cit., par. 34.

6CJEU, 5 December 2017, C-42/17, M.A.S. and M.B., op. cit., par. 36.

question of disapplying substantive law provisions on the statute of limitations as an option for disapplication by the public prosecutor according to the priority criteria. It is believed that no legitimate expectation of impunity is connected to constitutional protection that regulates the statute of limitations.

Disapplying the priority criteria by those who ultimately put PIF crimes does not affect the entire institution since the extinction of the related crime remains based on the expected term, that creates problems that respects substantial legality. In author's opinion, this is a more theoretical than practical problem and it is unlikely that the legislator will make the mistake of including in the PIF the scale of priority for serious frauds that are attributed to the European Public Prosecutor and the national criteria do not apply.[7]

The role of the College of the European Public Prosecutor

On the topic just examined above of the priority criteria does not pose the profile that respects the principle of legality by national law as well as that which respects the European regulation itself. The College of EPPO has the task according to art. 9, par. 2 to protect the coherence, efficiency, uniformity of a policy on criminal prosecution of the EPPO for all member states. It is asked whether this provision allows the body to adopt priority criteria for investigations and the exercise of action. Recital no.

7 See in particular Art. 25, par. 3, lett. a, of Regulation EPPO.

24 provides a positive answer that states:

"(...) college should adopt decisions on strategic issues, including defining the priorities and policy of the EPPO on investigations and prosecution (...)".

The political competence of the body includes the determination of priorities that remain in compliance with the principle of legality. The priority criteria have a selective function and the public prosecutor's offices are able to adequately manage the news of the crime that reach each other.

The priority criteria are in contrast with the principle of legality, which depends on whether the European Public Prosecutor manages the notitiae criminis that comes to its knowledge or not. The criteria have a regulatory nature. The criteria are selective in contrast with the principle of legality considering the settings that rigorously approach the principle of legality.

The most convincing approach is the one that notes that the adoption of the criteria of opportunity start from the assumption that they define the criteria proposed by the European Parliament if the ratio of the constitutional principle does not favor the necessity of action that is exercised if this occurs in homogeneous cases.

The principle of legality is a mandatory action. It does not change the priority criteria for EPPO. The problem is the separation of powers. The separation of powers is up to the interpretation of the law.

The competence to draft rules on priorities that are entrusted to the college is part of the European Public Prosecutor's Office. The criteria appear to be selective in nature and the college does not have democratic legitimacy. It takes decisions relating to criminal policy. Obviously it is not a problem relating to the legality of the criminal action.

Action in favour of another judicial authority and waiver of the criminal action

Art. 25, par. 4 of the EPPO Regulation provides that:

"(…) the EPPO, with the consent of competent national authorities, shall exercise its competence in relation to the offences referred to in Article 22, in cases which would otherwise be excluded by the application of paragraph 3, letter b), of this Article, if it appears that the EPPO is in a better position to carry out investigations or prosecutions (…)".

The Prosecutor waives the attribution in favour of the European body for reasons of effectiveness of the repressive action.

Any objection regarding the mandatory nature of the prosecution neutralizes the fact that the European source provides that the European Public Prosecutor is competent, according to art. 22, par. 3. EPPO according to Art. 39, par. 3 provides:

"(...) to close the case only after having consulted with the national authorities and that, in any case, after having ordered the closing (…) of the case, the Permanent Chamber shall refer the case to the competent national authorities in accordance with Article 34, paragraphs 6, 7 and 8 (…)".

The provisions infer that the scenario for the national authority has the power to initiate internal criminal proceedings despite

the fact that EPPO is oriented towards inactivity in the exercise of criminal prosecution.

The internal proceedings after the transfer are ordered upon request of the national authority and due to closing by the European Public Prosecutor according to art. 22, par. 3.

The function of referral for national authorities finalizes and verifies national legislation unlike the action that is not legally impossible and does not find a control on the work of a European body. It is also true that the EPPO Regulation does not impose obligations on domestic authorities.

It does not seem to preclude the possibility of starting an investigation due to the fact that national law regulates the case differently than European law. This is based on an autonomous evaluation of a technical nature, such as for example the standard of the rule to the judgment relating to the action that concludes the need to exercise criminal action and related requirements.

The European Public Prosecutor's Office has the possibility to take a decision on an investigation that starts. There is no obligation to start a European procedure that derives from recital 66. Art. 27, par. 1 of the EPPO Regulation does not include the principle of mandatory avocation. The confirmation also comes from the EPPO Regulation of the procedure that provides for deciding and avowing the investigation. As stated EPPO

assesses and controls:

"(...) deadline of the investigation; (b) the relevance of the investigation in order to ensure the coherence of the EPPO's investigation and prosecution policy; (c) the cross-border aspects of the investigation; (d) the existence of any other specific reason suggesting that the European Public Prosecutor's Office is in a better position to continue the investigation (...)".

The EPPO Regulation does not oblige the conduct of investigations (Zuidema, 2023). Such an issue is consistent with the principle of legality as established by it and the national authority.

The referral is not a problem in itself but can become only when the principle does not respect the public prosecutors of national origin. The resignation of a public prosecutor exercises attributions in favor of problems under the profile that is different from that of the legality of the action and that directly concerns the one pre-established by law.

Completeness of investigations and mandatory action

Regulation EPPO has accepted the principle of completeness of investigations. It excludes the existence of a conflict of the European legislation with national law. It is not given that there are significant and specific aspects with reference to the discipline and control of the obligation that presents defects and conflicts with national law. There is no problem with the control that is carried out by the judge. The preliminary hearing and the criminal action by the European Public Prosecutor apply rules for criminal procedure.

The judicial control presupposes and archives the completeness of the investigations to order the public prosecutor to carry out other investigations. There is no space for the judge to continue the integration of an evidentiary framework by requesting archiving by the EPPO and the national prosecutor.

An integration is carried out, according to art. 25, par. 2, of the investigative activities that are carried out by EDP. In this way, the Permanent Chamber is reinstated and gives instructions to the EDP.

The topic is relevant with the control of inactivity in a general way as well as the control for the completeness of the investigation by the EDP leaving out the control and its reference to legality. The logical basis is the obligation to carry out investigations which thus constitutes the mandatory rule considering the respect of the principle which is based on the request for archiving which is not legitimate and which concludes to a screening by the Permanent Chamber and which thus verifies the counter-limits of the European standard.

Reward rites

The principle of legality as provided by the regulation accesses simplified forms in the exercise of criminal action. There are no problems related to the spaces of choice to the prosecutor in the form of action that recurs and recognizes its own strategies.

The choice of the public prosecution body reflects substantially the reward rites. As a characteristic of these rites is the verification of the exchange, the waiver of the accused from his rights and a reduction of the sentence. It is excluded that the evaluation deals with this type of rites.

Discretion guarantees the defendant the reward rite that entails substantial advantages when the public prosecution opposes in an unjustified manner. The principle of obligation prevents the public prosecutor from accessing this type of rites, thus preventing the granting of significant mitigations to a sanctioning treatment based on evaluation criteria that are not provided for by law.

The prosecutor exercises the action in an ordinary form and unjustly refuses to grant the relative consent for the plea bargaining that occurs as a defect as well as the excess of an action that leads to other problems under the profile of equality.

The public prosecutor indirectly serves the sentence and the problem of the terms of inactivity hides the concession in favor of undue.

The reward rites are based on the discretion of the public prosecution body as well as on the objective and subjective prerequisites that are provided for by law and by the discipline relating to the jurisdictional control that refuses to adhere to the proposal of its defendant.

Admission to a rite occurs by giving consent after the evaluation of the case of unjustified dissent. The judge thus applies the penalty also considering the legal qualification of the fact, the circumstances between the parties and the determinations to confiscation up to conditional suspension for accessory penalties.

Regulation EPPO constitutes, for the institutions that find their own discipline in the national legal system and for the judge who carries out the same checks, the plea bargaining that requires from the EDP the simplified procedure of criminal prosecution.

Regulation and the checks against any proposals of a generous nature for the public prosecution provide the criteria that guide the prosecution body on the decision for access to the reward procedure. In this regard, art. 40 states that:

"(...) permanent chamber adopts a decision (...) taking into account the following reasons: a) the seriousness of the crime, based, in particular, on the damage caused; b) the will of the suspect to repair the damage caused by the unlawful conduct; c) the conformity of the use of the procedure with the general objectives and basic principles of the EPPO referred to in this Regulation (...)".

Such reasons find greater clarification thanks to the guidelines for the college and the emanation that is provided for by the same provision. The principle of legality protects the criteria that are not examined by the judge thus constituting the Permanent Chamber that refers to the request of the EDP.

The reasons for the use of reward rites are typified with the quantification of the reduction of the sentence. The regulation leaves a certain discretionary space in the Permanent Chamber and in the choice of the public prosecutor for the plea bargaining. It is difficult to support compliance with the plea bargaining. It raises problems regarding the principle of legality of the criminal action.

The same argument also applies to the penalty that requires the parties to issue a penal decree of conviction. The national public prosecutor establishes the application of a pecuniary penalty that inflicts the substitution of the custodial sentence presenting the relative request to the judge.

The judicial control adds the criteria that are provided for by the regulation and access to simplified procedures. In the context of the European Public Prosecutor's Office, the decision to access the simplified procedures relating to criminal prosecution takes place by the Permanent Chamber in charge. Thus, the proceedings relating to the EPPO are maintained, as a control that uses the prerequisites established by national law.

The regulation does not include elements that lead to doubts of compatibility with national criteria that can be oriented to the determinations of the prosecution body.

(Follows). The reasons for archiving

As regards the reasons for archiving, the connection between the principle of obligation and legality regulates archiving as a dark side. Archiving as an institution thus assumes, in the face of the inactivity of the public prosecutor, the actual absence of the prerequisites for action.

The screening of choices for the public prosecution is necessary since the regulatory parameters are established at the time that the inactivity is granted. For this reason the parameters are sufficient and decisive. The prerequisites are formulated with adequate specificity and avoid the evaluations of the public prosecutor.

The validity of the news of the crime that the public prosecutor has the duty/power not to act is a standard that considers unconstitutional the regulation that sets a substantial threshold in this regard. The minimum requirements and the regulation for the reasons for archiving comply in a compliant manner with the principle of legality that is verified by EPPO Regulation.

The existence of prerequisites and the evaluation of the public prosecutor are provided for by art. 39. A doubt arises when the inactivity of the European Public Prosecutor for atypical reasons occurs if one considers the list of an exemplary legislation.

Art. 39 and recital 81 of the EPPO Regulation indicate the peremptoriness, as a deliberate choice of the European legislator

according to the principle of legality of the criminal action. The text of the European Prosecutor's Office does not pose any particular problems.

The archiving provides for inactivity according to European reasons which corresponds to the national reasons which pose problems of identification and correspond to the formulation of a supranational text of a generic nature which adapts to the countries adhering to the principle of enhanced cooperation. The observations are formulated and the indeterminacy remains to the majority of the EU states.

The problems are not unsolvable and have to do with the evaluation of the concept of infirmity which is used in accordance with art. 39, par. 1, lett. b) including cases of non-imputability which are provided for by national law.

Letter g) of Art. 39 of the EPPO Regulation refers to the lack of relevant evidence. It does not seem to be problematic if it reasonably considers the groundlessness of the notitia criminis.

The objectivity of the criteria does not signal particular difficulties and the prerequisites for archiving refer to the EPPO Regulation leaving room for subjective conditioning in terms of inappropriateness of the criminal action. Letter g) of art. 39 does not exclude this.

A doubt arises from the internal formula that recalls the reasonable prediction of the sentence that is regulated by

judgment and is in contrast with the EPPO Regulation. This is a question of disapplication that attributes to the European Prosecutor's Office an internal rule that respects the European source.

The subjective elements are reduced and it is impossible to eliminate them all. The impression that a reasonable term is inserted in the legislative text contributes to the objectivization of the individual representative of the prosecution. The presence of subjective elements play a role as a criterion. The legislative text respects the canon of legality. EPPO exercises its work. The trial removes the evaluations of compatibility with national law thus investing in analysis of rules.

The criminal action respects the precedent and takes into consideration the efficiency of a system that is compatible with the EPPO Regulation and the internal constitutional law.

Control on the request for archiving

The control by a superior body is important for the exercise of the criminal action. It is related to the general prosecutor and the archiving control. It is preferable to consider as self-sufficient that the Permanent Chamber decides for archiving. Such a decision is submitted to national judges.

The non-jurisdictional control verifies as sufficient the relationship that exists between EDP that proposes the relative

archiving and the Permanent Chamber that decides and allows the negative requirement for the existence of an internal hierarchy. The control of CJEU satisfies the requirement for the jurisdictional screening considering a negative response necessary.

The judges of Kirchenberg seek an agreement between the European prosecutor and the institutions of the Union. In reality, there is no problem of external independence for the public prosecutor. The control is considered necessary and does not doubt the position of independence that respects the political power that the public prosecutor enjoys.

External independence eliminates the need for an adequate screening. Doubts arise about the compatibility of constitutional rank's control that increases the inactivity of the offended person as a bearer of political interests. We speak for PIF crimes in consideration of the fact that crimes that offend the union will have to be punishable.

This logic is also found in the spirit of EPPO Regulation and in personal interests. The argument does not apply to crimes harmful to the financial interests of the Union that are of a public nature.

The problems start from a different assumption that admits non-jurisdictional control. Such a control is excluded by the CJEU. The Permanent Chamber is entrusted with the assessment of

archiving the case. There are no difficulties regarding the screening that carries out the requests that are resolved by the magistrates of the EPPO.

The mitigation and elimination of such problems are connected to the Permanent Chambers and EDP. According to Art. 46, par. 1 of the EPPO Regulation the power to provide instructions to the EDP is noted. Art. 10, par. 5 of EPPO Regulation concerns the adoption of specific measures according to the orientation of investigation to an EDP that has entrusted itself in the hypothesis that it has no other indications.

The implementation of a strict control over the investigative body of a decentralized nature has a hierarchical relationship that makes it subject to scrutiny on decisions relating to the criminal action.

The EPPO Regulation avoids that the principle of legality at the time of the decision to archive is lacking and complies with the various national requirements. It is sufficient to draw conclusions for the European regulation that is in contrast with the internal sources prevailing according to the constitutional positions of a national level.

In the case of false and fraudulent news, it is considered that a practice is part of the general spirit of the regulation. The European discipline states that the principle of favor actionis has as its objective the repression of crimes harmful to the interests

of the Union. This research is excessive and requires the choice of rigorous forums that prevent excesses such as forum shopping.

The characteristics of the criminal action are in line with criminal procedural reconstructions oriented towards a monopolism of the public prosecutor and the exercise of the presence of particularity that respects the simplifying and particular exercise of this institution. At an internal level, the difficulties result from the fact that the decisions are inherent with the criminal action that touch the constitutional rank of control.

The constitutional positions offer difficulties to an internal perspective. In such a case, one thinks of the discussion of the legitimacy of the priority criteria for the selective function. The necessary need for the regulation shows that it respects the constitutional canons and that it provides by virtue the principle the primacy of the law of the Union.

The jurisdictional control of the archiving and its interpretation wants that the Permanent Chamber has oriented itself towards inactivity. In such a case, the proceeding is considered archived without reviewing the decision by an internal judge.

The jurisdictional control and the control carried out by an external body assume a decision that is necessary for objectives of a constitutional nature. Legal solutions exist, in this regard.

Less can be said for its political nature.

The application of the primacy of European law and the ability of the European Prosecutor to act is reduced leaving to the national legal systems the process of European integration, in which EPPO is the protagonist. In this way, negative consequences are reduced in terms of the protection of fundamental rights and of the uniformity that governs and establishes a lower standard than that expected for the participating countries.

The EPPO Regulation is not able to orient oneself towards an imbalance of the system's structure.

The process of European integration does not develop the fight against repression but concerns the need for the protection of subjects that have to do with criminal law. It prevents national systems from activating mechanisms of a defensive nature. It, therefore, protects fundamental rights and the creation of a European criminal system in continuous evolution and integration.

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